80-1090

No.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

MARY HATCHER, RANDOLPH HATCHER,
EUGENE HATCHER and
VELMA HATCHER TALBERT,
Petitioners,

versus

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to
The United States Court of Appeals
For the Fifth Circuit

JOINT PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

I

WHETHER EVIDENCE REFLECTING THAT THE GOVERNMENT HAS AGREED WITH ITS PRINCIPAL WITNESS TO HELP HIM AS TO GRAVE CRIMINAL CHARGES AGAINST HIM AND REFLECTING THAT THIS WITNESS PERJURED HIMSELF ON THE STAND TO CONCEAL THIS ARRANGEMENT SHOULD MANDATE A NEW TRIAL OR AT LEAST AN INQUIRY BY THE TRIAL COURT.

II

WHETHER THE TRIAL COURT SHOULD GRANT A HEARING REQUESTED BY THE DEFENSE TO INQUIRE INTO FACTS WHICH IMPLICATED AT LEAST A POST-TRIAL *BRADY* VIOLATION BY THE UNITED STATES IN CONCEALING AN ARRANGEMENT BETWEEN THE GOVERNMENT AND ITS PRINCIPAL WITNESS WHICH WOULD HAVE DEMONSTRATED PERJURY AND SIGNIFICANT BIAS.

III

WHETHER THE UNITED STATES SHOULD BE REQUIRED TO AT LEAST REPLY TO FACTUAL ALLEGATIONS WHICH DEMONSTRATE PERJURY AND BIAS ON THE PART OF ONE OF ITS PAID INFORMANTS WHEN THE SUBJECT OF THESE ALLEGATIONS IS PARTICULARLY WITHIN THE FACTS WHICH THE GOVERNMENT KNEW OR SHOULD HAVE KNOWN.

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JOINT PETITION FOR CERTIORARI

The Petitioners, MARY HATCHER, RANDOLPH HATCHER, EUGENE HATCHER and VELMA HATCHER TALBERT, respectfully pray a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on November 3, 1980.

CITATIONS TO OPINIONS BELOW

The United States District Court for the Southern District of Alabama, Northern Division entered a Judgment of conviction as to these Petitioners on November 27, 1979. In an unpublished Memorandum Opinion, *United States v. Mary Hatcher, et al.*, Cause No. 79-5700 (November 3, 1980), the United States Court of Appeals for the Fifth Circuit affirmed these convictions, (reproduced herein as Appendix A).

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) and Supreme Court Rule 22. The Judgment of the District Court was affirmed by the Court of Appeals on November 3rd, 1980. The Joint Petition for a Writ of Certiorari was filed within sixty (60) days of that date, Supreme Court Rule 22.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The United States Constitution, Amendment V provides in pertinent part:

   > No person shall be held to answer for a capital, or otherwise infamous crime, . . . nor be deprived of life, liberty, or property, without due process of law; . . .

2. The United States Constitution, Amendment VI provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

MARY HATCHER, RANDOLPH HATCHER, EUGENE HATCHER and VELMA HATCHER TALBERT, Petitioners herein, were jointly indicted on September 7, 1979 in an indictment charging them with three counts of possession of varying amounts of heroin[1] with intent to distribute, 21 U.S.C. §841(a)(1), and one count of conspiracy to possess heroin with intent to distribute, 21 U.S.C. §846, §841(a)(1), (RI 1-2). Following their convictions of all counts, the Petitioners were sentenced to fifteen (15) years imprisonment, and five (5), five (5), eight (8), and five (5) years special parole, respectively, (RI 49-52).

The government's witness to the alleged heroin dealings was one Leonard Martin, (RII 15) who admitted that he was "a paid informant, undercover informant for the DEA," who had "participated in different trials,"

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1 Count One, 290 milligrams; Count Two, 8.1 grams; Count Three, 8.1 grams.

(RII 15). Mr. Martin also admitted that he had a 1970 conviction for stolen property, (RII 16).[2]

Mr. Martin testified that pursuant to Agent Brown's instructions, he circulated around "pool halls, bar rooms," etcetera telling various persons he was interested in "buying" drugs, (RII 17). According to informant Martin, he purchased varying amounts of heroin from the Petitioners herein on March 15, 1979, (RII 20); March 29, 1979, (RII 25); April 19, 1979, (RII 31). Informant Martin testified that one Officer Stanton, of the Alabama Police Department, was with him on two of the occasions and witnessed him giving the money to Mary Hatcher, (RII 28), but did not personally witness the transactions, (RII 64, 70).

On cross-examination, Mr. Martin admitted that he was arrested in March 1979 in Selma, Alabama (Dallas County) for "unauthorized use of a credit card" and that his bond was "$5,000," (RII 37). Mr. Martin denied jumping bond for that charge, (RII 36). Mr. Martin was specifically queried whether the government has performed any services for him or promised him anything in regard to the Selma charges, but denied such assistance, (RII 36).

In regard to this line of questioning, defense counsel advised the Court at side bar:

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2 The trial court excluded felony convictions of Mr. Martin in 1965 and 1966.

MR. FAILE: Judge, a man is an admitted paid informer. I've got evidence or I would not be asking him the questions.

I have information that he was arrested on a felony charge in Selma and the case has been taken care of. Now, this deal about the credit cards, whatever deal he has with the Government, I think would be pertinent and it falls in the same category as we are here. He has arrangements with the United States Government. (RII 39-40)

And the Assistant United States Attorney responded:

MR. FAVRE: I don't know anything about the case being taken care of or anything about his credit cards, but I still say that that is an entirely separate thing and apart from this.

I made it clear to this jury and counsel that he has been a DEA informant before and, in fact, with cases in this court. But the fact he is doing something with credit cards, I don't see how it has anything to do with this. (RII 40).

Thereafter, the Court admonished defense counsel:

THE COURT: Well, I'm going to let you go into whether he has arrangements with the Government.

Of course, the Government may compensate him for other things. You better have some evidence to back up what you are trying to ask him or I am going to blow you out of the tub to the jury because you are leaving an inference that if you don't have evidence to back it up is improper.

MR. FAILE: I have a witness, Your Honor. (RII 40).

One "witness" as to these facts, although initially called by the government, was Case Agent Cliff Brown, who testified:

A. Yes. I don't know if [Leonard Martin] was in jail when I talked to [the Bondsman] or not, but in close proximity.

Q. Based on the conversation you had with [the Bondsman] did you take any action?

A. Yes, I did.

Q. What did you do?

A. I came to Selma, Alabama, and I paid Leonard Martin some money to make bond with.

Q. You were acting on behalf of the United States Government?

A. Yes. (RII 93-94)

Agent Brown did not testify as to any other agreements with Informant Martin, (RII 78-98).

The defense case consisted of Mary Hatcher and Velma Talbert with the Petitioners taking the stand and denying that they sold heroin to Leonard Martin, (RII 108 et seq; 131 et seq).

Following the convictions of all Petitioners, defense counsel learned that in spite of the fact that:

> Leonard Martin denied the existence of any understanding or agreement with regard to the disposition or handling of the said forgery charges; that a conditional bond forfeiture was taken in Dallas County Circuit Court against the surety on the bond filed by Leonard Martin and at one point the bond was raised to $50,000.00 from $5,000.00; that Leonard Martin was returned to the Circuit Court of Dallas County, Alabama was advised of the aforesaid understanding or agreement relative to Leonard Martin and on November 6, 1979 he was ordered released on his own recognizance; . . . (RI 47)

And further alleged that such facts showed:

> . . . that the Assistant United States Attorney and the District Attorney for Dallas County, Alabama had an understanding with

> regard to forgery charges pending against Leonard Martin in Case No. CC-79-90 in the Circuit Court of Dallas County, Alabama; . . . (RI 46)

Counsel for defense represented that his witness for the facts underlying this allegation was the Selma Bondsman Erskin Mobley, who would have testified as to the facts which occurred in Selma, Alabama[3] on November 6, 1979 after Informant Leonard Martin was excused, (RII 45). These newly discovered facts were submitted to the Court in a *Motion for New Trial* timely filed on November 14, 1979, (RI 46-48).

The government did not reply to or deny the allegation in writing or otherwise, (RI 46, et seq). The Court denied the Motion without hearing and without requiring the government to answer on the day of sentencing, November 21, 1979, (RI 46).

The Petitioners then raised this issue on appeal to the United States Court of Appeals for the Fifth Circuit, (Appellant's *Brief*, at pp. 1, 8, 12-14). The United States, in its twenty four (24) page *Brief of Appellee*, pointedly *failed to deny the allegation that an arrangement had been made be-*

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3 Although originally scheduled for trial in Selma, Alabama, the case was actually tried in Mobile, Alabama, (see docket sheet p. 2, RII p. 1). Thus, the November 6, 1979 events involving Informant Martin occurred out-of-town, and out-of-county.

tween the United States and its paid informant, Leonard Martin.[4] It is anticipated that should the government decide to answer this *Petition*, that it will continue to avoid this issue and will admit this fact by implication.

The government in its *Brief of Appellee*, at pp. 19-22 contended that: Petitioners had knowledge of these facts during trial:

> The record does show that defense counsel was very much aware of these alleged facts during the trial. The witness Martin was cross examined concerning the issue (TR., Vol. II, pp. 36-41) and the court was informed at an in-chambers conference during the course of the trial of the facts alleged in the motion.

However, the facts in the record dispute this assertion. First, the earlier bench conference, (RII 39, et seq), *occurred on November 5th, 1979*, (RII 1) while Martin was still on the stand, (RII 39 et seq). How defense counsel would have knowledge at that juncture of events which were to occur after Martin left the stand and traveled to Selma on the next day, November 6th, 1979, is unclear, (RI 47). Likewise, the second bench conference in

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4 This fact would demonstrate not only that informant committed perjury on the stand when he testified that there was no arrangement, (RII 36); and would show a significant bias in favor of the government since the records show that this Selma charge could become Martin's fourth felony conviction, thereby placing him in jeopardy of the harsh habitual criminal statutes, see ALA. CRIM. CODE §13A-5-9, et seq.

the early morning of the 6th in Mobile, Alabama, (RII 101) could not have been the product of the events which occurred later in Selma, Alabama; and indeed the record shows that this discussion revolved around certified copies of "the bond" and "arrest [warrant]" which had been filed in the Selma case against Martin long before trial, (RII 101-108). The United States also contended that the evidence of the arrangement would have only "impeached" Martin and thus would not have affected the case, *Brief of Appellee*, pp. 20-21. There is no mention in either of these portions of the record of the events which were later to transpire on the 6th of November, specifically that after his testimony, thrice-convicted Martin was taken to Selma, Alabama and accorded a personal recognizance bond on his fourth felony charge, (RI 47).

REASONS WHY THE WRIT SHOULD BE GRANTED

I

Whether Evidence Reflecting That The Government Has Agreed With Its Principal Witness To Help Him As To Grave Criminal Charges Against Him And Reflecting That This Witness Perjured Himself On The Stand To Conceal This Arrangement Should Mandate A New Trial Or At Least An Inquiry By The Trial Court.

A. The Factual Circumstances.

The allegations in the *Motion for New Trial* (RI 46-47) if proved would have demonstrated the perjury of the principal government witness on the stand, (RII 36); and would have demonstrated a considerable bias in favor of the government.[5] Perjury is normally seen as reflecting on credibility of a witness as would the prospect of a witness facing from fifteen (15) years to life imprisonment, ALA. CRIM. CODE §13A-5-9, et seq, but for government intervention. Here, we have a compounding of these factors, perjury to conceal this significant bias.

B. The Decisions of the Fifth Circuit and Other Courts of Appeal.

This holding by the Fifth Circuit in its unpublished Opinion, *United States v. Hatcher, et al.*, Cause No. 79-5700 (November 3, 1980), (see App. A), runs afoul of its own published Opinion in *United States v. Antone*, 603 F.2d 566 (5th Cir. 1979) where that Court held that where the prosecution allows false evidence to go uncorrected, and when it does so regarding promises made to witnesses to induce them to testify, a new trial should be granted if the truth is reasonably likely to have produced a different result, *Antone*, 603 F.2d at 570. The *Antone* court distinguished its facts from the above standards by finding that the matter involved, the

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5 See Note 4, *Supra.*

government's payment of the witness' attorney was not significant and was "not a promise by which [the witness] was induced to testify," 603 F.2d at 570. Here, the arrangement was not only highly significant, but clearly was the sort of arrangement which would have influenced any witness, i.e., the help of the government in avoiding an habitual criminal sentence.

The Seventh Circuit encountered a similar problem in *United States ex. rel. Wilson v. Warden Cannon, etc.*, 538 F.2d 1272 (7th Cir. 1976), and quoted *Giglio v. United States*, 405 U.S. 150, 153-154 (1954) to the effect that:

> As long ago as *Mooney v. Holohan*, 294 U.S. 103, 112, [55 S.Ct. 340, 342, 79 L.Ed. 791] (1935), this Court made clear that deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice.' This was reaffirmed in *Pyle v. Kansas*, 317 U.S. 213, [63 S.Ct. 177, 87 L.Ed. 214] (1952). In *Napue v. Illinois*, 360 U.S. 264, [79 S.Ct. 1173, 3 L.Ed.2d 1217] (1959), we said, '[t]he same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears.' Id., at 269 [79 S.Ct. 1173 at 1177]. Thereafter *Brady v. Maryland*, 373 U.S. [83] at 87, [83 S.Ct. 1194 at 1197, 10 L.Ed.2d 215], held that suppression of material evidence justifies a new trial 'irrespective of the good faith or bad faith of the prosecu-

> tion.' See American Bar Association, Project on Standards for Criminal Justice, Prosecution Function and the Defense Function §3.11(a). When the 'reliability of a given witness may well be determinative of guilt or innocence,' non-disclosure of evidence affecting credibility falls within this general rule. *Napue, supra,* 360 U.S. at 269. [79 S.Ct. 1173 at 1177]. . . .

Additionally, the Third Circuit handled an identical problem in *United States v. Harris,* 498 F.2d 1164 (3rd Cir. 1974), where the facts revealed:

> When testimony began on the second day of trial, Ms. Johnson was the first witness. Defense counsel established that she had recently pleaded guilty in state court to assault with intent to kill, possession of heroin with intent to deliver, and possession of narcotics, but that she had not yet been sentenced on these counts. She then denied that the Government had promised her that she 'would receive favorable treatment from the [state] court' because of her cooperation with the federal authorities, and she denied that she had been 'promised any help' in the state proceeding by the Government. (footnote omitted) (*Harris,* 498 F.2d 1167)

Accordingly the Third Circuit held:

> [1] A convicted defendant is entitled to a new trial if he can establish that the Government intentionally or inadvertently failed to correct materially false testimony relevant to the credibility of a key Government witness at the trial, including evidence concerning 'any understanding or agreement as to a future prosecution' between the witness and the Government. (*Harris*, 498 F.2d at 1168, [citing *Giglio, Supra*])

The *Harris* Court found that the *Giglio* standard mandated that the defendant is entitled to a new trial.

> . . . if the false testimony denying the existence of an agreement could 'in any reasonable likelihood have affected the judgment of the jury.' *Giglio, supra*, 405 U.S. at 154; *United States ex rel Dale v. Williams*, 459 F.2d 763, 767 (3d Cir. 1972). This factor is dependent upon the relative importance of the witness' testimony to the Government's case. (*Harris* 498 F.2d 1169)

In our case, the significance of Mr. Martin's testimony is the same or greater than the informant in *Harris*, (see RII 15 et seq). Thus it would appear that there is a clear

Circuit conflict with the approach taken by the Fifth Circuit in *Hatcher, supra.*[6]

C. The Decisions of this Court.

The decision of the Fifth Circuit runs contrary to specific holdings of this Court in *Giglio,* 405 U.S. 150 at 153-154, and other holdings in *Pyle, supra; Napue, supra,* and *Brady, supra.*

II

Whether The Trial Court Should Grant A Hearing Requested By The Defense To Inquire Into Facts Which Implicated At Least A Post-Trial *Brady* Violation By The United States In Concealing An Arrangement Between The Government And Its Principal Witness Which Would Have Demonstrated Perjury And Significant Bias.

III

Whether The United States Should Be Required To At Least Reply To Factual Allegations Which Demonstrate Perjury And Bias On The Part Of One Of Its Paid Informants When The Subject Of These Allegations Is Particularly Within The Facts Which The Government Knew Or Should Have Known.

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6 The Petitioners would also refer this Court to *United States v. Newman,* 476 F.2d 733, 737-738 (3rd Cir. 1973); *United States v. Kaplan,* 470 F.2d 100 (7th Cir. 1972), cert. denied 410 U.S. 966 (1973).

A. The Factual Circumstances.

The District Court received the *Motion for New Trial*, (RI 46), but did not require the government to reply orally or in writing, and denied such Motion without hearing or argument, (RI 46).

B. The Decisions of This Court.

In *United States v. Agurs*, 427 U.S. 97 (1976), this Court encountered a concealment of a criminal record of a murder victim which "not even arguably [gave] rise to any inference of perjury," 427 U.S. at 114; and which the trial judge's "firsthand appraisal of the record was thorough and entirely reasonable," 427 U.S. at 114. In our case, the subject matter of the concealed evidence implicated perjury to conceal bias. Also, in the instant case, the trial court did not even accord the defense a hearing even when the government failed to deny the allegations, (RI 46, et seq).

In spite of the fact that the trial court had heard some evidence that a deal might have existed, the payment of bond by the government, etcetera, (RII 93-94). In spite of the fact that the government's counsel did not flatly deny any "deal" at trial, but only claimed a lack of personal knowledge, (RII 40); in spite of the fact of the personal recognizance bond, etcetera, presented in the *Motion for New Trial*, (RI 47); and in spite of the fact that the government failed to deny the allegations in the Motion, (RI 46-47), the Court declined even to place the

government in a position of denying whether there was a deal or not. Realistically speaking, there could only be two parties to this arrangement, Martin and the government. Martin denied the existence of any arrangement, (RII 36), and the government claimed lack of knowledge, (RII 40). Therefore, the defense could only present significant but circumstantial evidence of the "deal," i.e., the bond arrangements, etcetera. By not requiring a forum by which the government would be required to admit or deny the existence of this arrangement, the trial court denied the defense any real opportunity to establish this agreement. This is because only the government or Martin could really establish the existence of the bargain which in turn would prove that Martin perjured himself to conceal his bias.

It is the Petitioner's position that the more responsible of the two parties, the government, should have been required to go beyond its trial counsel's denial of personal knowledge at trial, (RII 40);[7] and admit or deny the existence of the agreement. Without such forthrightness, the matter will remain forever buried. To allow the government to achieve passively what it is

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7 Petitioners' former appellate counsel, admitted that he had no evidence of government counsel's personal knowledge at trial, Appellant's *Brief*, at p. 16, however, Petitioners contend that government counsel "should have known," *Mooney, supra;* and that the United States knows now that such an agreement did exist.

prohibited from doing actively is just as destructive of the truth seeking process and the fairness of our criminal justice system, *Napue*, 360 U.S. at 269.

CONCLUSION AND PRAYER

WHEREFORE, the above premises considered, the Petitioners respectfully request that this Court grant a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned attorney of record for Petitioners, MARY HATCHER, RANDOLPH HATCHER, EUGENE HATCHER, and VELMA HATCHER TALBERT, hereby certifies as follows:

(a) That I am a member of the bar of the United States Supreme Court, and that I have duly served all parties required by the Rules of said Court to be served with the foregoing Petition for Writ of Certiorari, as hereinafter shown:

(b) That the names and addresses of the attorneys of record for the adverse party are as follows:

The Honorable Wade H. McCree, Jr.
Solicitor General of the United States
Department of Justice
Washington, D.C. 20530

William R. Favre, Jr.
Assistant United States Attorney

W. A. Kimbrough, Jr.
United States Attorney
311 Federal Building
Post Office Drawer E
Mobile, Alabama 36601

(c) That on this day I served three printed copies of the foregoing Petition for Writ of Certiorari on the said Wade H. McCree, Jr., and the said William R. Favre, Jr. and W. A. Kimbrough, Jr., attorneys for said Respondent, by depositing same in the United States post office, with first class postage prepaid, properly addressed to said attorneys for Respondent at their said addresses.

EXECUTED, this ____ day of December, 1980.

JOSEPH (SIB) ABRAHAM, JR.
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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 79-5700
Summary Calendar

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

MARY HATCHER, RANDOLPH HATCHER,
EUGENE HATCHER and
VELMA HATCHER TALBERT,
Defendants-Appellants.

Appeal from the United States District Court for the
Southern District of Alabama

(November 3, 1980)

Before CHARLES CLARK, VANCE and SAM D. JOHNSON, Circuit Judges.

PER CURIAM:

In this case defendants appeal their conviction for selling heroin and conspiracy to distribute heroin. They

contend that they were deprived of a fair trial by the limitations the trial court judge placed on defense counsel's cross-examination of two prosecution witnesses. In addition, they assert that the trial court committed reversible error in failing to grant their motion for a new trial based on the existence of newly discovered evidence. Since the district court judge's rulings did not constitute an abuse of discretion, we affirm.

Mary Hatcher, Randolph Hatcher, Velma Hatcher Talbert, and Eugene Hatcher were charged in a four count indictment filed September 7, 1979, with violations of the federal drug laws, 21 U.S.C.A. §§841(a), 846. On November 7, 1979, a jury found all four defendants guilty as charged. On November 14, 1979, appellants filed a motion for judgment of acquittal notwithstanding the verdict, or in the alternative, for a new trial. That motion was denied without a hearing on November 27, 1979, the day of sentencing. On November 27, Eugene Hatcher received a sentence of fifteen years of imprisonment, with a special parole term of eight years to follow. The other three defendants were each sentenced to fifteen years, followed by special parole terms of five years. All four defendants have appealed.

Appellants contend that the district court improperly restricted the cross-examination of Government witnesses Leonard Martin, a paid Government informant who was involved in the drug transactions on

the Government's behalf, and Charles Clark, a forensic chemist employed by the Drug Enforcement Administration (DEA). In an attempt to impeach Martin's credibility, on cross-examination defense counsel inquired into criminal activity of the witness and arrangements he had with the Government. Martin testified that he had been arrested in Dallas County, Alabama, and charged with unauthorized use of a credit card. He denied jumping bond, stating that he had appeared in court within one week of his arrest. Although he had told Government officials of his arrest, he denied having any knowledge that the Government officials had "taken care" of the state charge, as alleged by defense counsel. Martin testified that he worked as a paid informant for the DEA and also worked with the United States Postal Service retrieving credit cards, sending them to the credit card companies, and recovering a reward. Upon objection by the prosecution, the district court ruled that defense counsel's inquiry would be limited to any arrangement Martin had with the Government, including any Government payment for recovered credit cards, but the inquiry could not extend to arrangements between Martin and the credit card companies. Martin testified that the Government paid him nothing for retrieving the cards; his only arrangements were with the credit card companies. Appellants contend that the limitation on the scope of inquiry denied them their right to cross-examination.

Appellants also contend their right to cross-examination was improperly curtailed during the testimony

of DEA forensic chemist Charles Clark, an expert witness on behalf of the Government. The witness orally testified as to the weight (in grams and milligrams) of heroin involved in each count of the charge. To demonstrate the minuteness of the amount of heroin involved in Count One, defense counsel asked Clark to indicate on a blackboard the amount of space the corresponding weight of heroin would fill. Upon objection, the court refused to allow the witness to comply with the request and, in addition, refused to allow defense counsel to pursue that line of questioning.

A trial court's limitation of the scope of cross-examination will be upheld absent an abuse of discretion. Cross-examination, however, is an essential tool through which to expose a witness' motivation for testifying. Particularly in matters involving credibility, therefore, extensive opportunity to cross-examine should be allowed. United States v. Williams, 592 F.2d 1277, 1281 (5th Cir. 1979); United States v. Crumley, 565 F.2d 945, 949 (5th Cir. 1978).

Although great latitude in the cross-examination of a prosecution witness is generally allowed in criminal cases in order to provide an opportunity to test credibility, the matters into which counsel inquires must potentially have some bearing on the witness's credibility. Here, the trial judge allowed defense counsel to inquire fully into any arrangement that existed between the Government and Martin with respect to the

credit cards. The limitation involved only the agreement between private credit card companies and Martin. Any arrangement between those parties would not suggest that Martin was testifying as a result of a deal with the Government and would not tend to show bias. Although "cross-examination of a witness in matters *pertinent to his credibility* ought to be given the largest possible scope," McConnell v. United States, 393 F.2d 404, 406 (5th Cir. 1968) (emphasis added), the limitation on cross-examination involved here had no bearing on credibility and was not an abuse of discretion.

Similarly, the limitation placed upon the cross-examination of Charles Clark was not an abuse of discretion. The witness's oral testimony sufficiently indicated the small amount of heroin involved.[1] Furthermore, whether Clark could draw on a blackboard the amount of space that a particular weight of heroin would occupy does not affect his credibility. Defense counsel was entitled to liberal cross-examination regarding Clark's qualifications to testify as an expert and his credibility. The line of questioning disallowed by the district court, however, went to neither of these matters.

Appellants also contend that the district court erred in denying their motion for a new trial. They claim that

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1 That only a small amount was involved is irrelevant, since even the smallest quantity of an illegal substance is sufficient to sustain a conviction. United States v. Harold, 588 F.2d 1136, 1143 (5th Cir. 1979).

a new trial is necessary to introduce newly discovered evidence indicating that Leonard Martin was receiving assistance from the Government and tending to show that his testimony was motivated by the expectation of a reward. This evidence, appellants argue, bears sufficiently upon the credibility of the witness to mandate a new trial in the interests of justice. Fed. R. Crim. P. 33.

The newly discovered evidence submitted by appellants here is that on November 6, 1979, Leonard Martin was delivered to the Dallas County jail in Alabama by a bondsman under a bond forfeiture. Although there was a $50,000 bond set for Martin, the court allowed him released on his own recognizance. Appellants contend that this establishes an agreement between the United States Attorney's office and the District Attorney's office in Dallas County, Alabama, particularly in view of appellants' allegation that the original bond of $5,000 had been increased to $50,000 when Martin did not appear for arraignment. In his testimony at trial on November 5, Martin had stated that no promises had been made to him by the Government concerning the disposition of the pending state charges against him.

The denial of a motion for a new trial will be reversed only if it is so clearly erroneous that it constitutes an abuse of discretion. The requirements for a new trial on the basis of newly discovered evidence are: "The evidence must be discovered following trial; there

must have been diligence on the part of the movant to discover the new evidence; the evidence is not merely cumulative or impeaching; the evidence is material; and a new trial would probably produce a new result." United States v. Zicree, 605 F.2d 1381, 1390 (5th Cir. 1979) (quoting United States v. Prior, 546 F.2d 1254, 1258 (5th Cir. 1977)), *cert. denied sub nom.* 100 S.Ct. 1656 (1980).

The trial judge correctly denied appellants' motion. The new evidence appellants sought to introduce was cumulative and would not have been likely to have changed the outcome at a new trial. The jury heard evidence regarding Martin's past felony conviction and the charge for a credit card offense pending against him in state court. The jury was informed that Martin had been working for the Government as a paid informant for eight years and that the Government had given Martin money to enable him to make bond on the state credit card charge.[2] Furthermore, although Martin was the only witness who saw firsthand the entire drug transactions at issue, he was not the only witness to testify to appellants' involvement in the drug transactions.[3] In view of the evidence before the jury, it was

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2 Clifton L. Brown, Special Agent with the DEA, gave Martin the money. The payment was set off against payments due Martin for his services as an informant.

3 Alcoholic Beverage and Control Agent Clinton Stanton testified that on several occasions he saw Martin pay money to appellants, and that after spending a short time alone with appellants, Martin returned with packages of heroin.

not an abuse of the district court judge's discretion to deny the motion for a new trial.

Some of the factual allegations made by appellants in their motion were known to them at the time of trial. At an in-chambers discussion that occurred during the course of the trial, defense counsel told the judge he had evidence that Martin had failed to appear at his arraignment, that his bond had been raised from $5,000 to $50,000, and that the court had instructed the bail bondsman to take no action against Martin. This was not newly discovered evidence that could support appellants' motion for new trial.

The limitations of the district court on cross-examination and the denial of the motion for new trial did not abuse the trial judge's discretion. The decision of the district court is AFFIRMED.